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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-255

HAZELWOOD SCHOOL DISTRICT ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS [1]

The National Education Association ("NEA") is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession

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[1] The parties have consented to the filing of this brief and their letters of consent have been tendered to the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

of teaching or other educational work, or any person interested in advancing the cause of education. NEA presently has more than 1,500,000 regular members and is the largest professional organization in the nation. Pursuant to the terms of its charter, 34 Stat. 805 (1906), NEA's purpose is "to elevate the character and advance the interest of the profession of teaching, and to promote the cause of education in the United States."

In pursuit of these goals, NEA has supported school desegregation in the North and South and to that end has submitted briefs amicus curiae in such cases as *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1, Denver,* 413 U.S. 189 (1973); *Richmond School Board* v. *State Board of Education,* 412 U.S. 92 (1973); and *Milliken* v. *Bradley,* 418 U.S. 717 (1974).

The instant case is of particular concern to NEA because petitioners' arguments, if accepted by the Court, would deny to most teachers and prospective teachers the protections that Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, affords to persons who are not public employees. Furthermore, petitioners' arguments, if accepted, would necessarily lead to an unduly narrow construction of Congress' power, pursuant to the Commerce Clause and Section 5 of the Fourteenth Amendment, to legislate on matters affecting public education and the rights of public employees.

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case arises from a school district in St. Louis County, Missouri, that was segregated by law prior to *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Thereafter, by various means including racially discriminatory advertising and other forms of discriminatory recruiting, the school district maintained an all-white faculty until the fall of 1969. In hiring matters, the school district entrusted virtually absolute discretion to its all-white staff of 23 principals who in turn utilized their own brands of vague and highly subjective hiring criteria. These procedures and criteria produced a dynamic process whereby vacancies vanished when eligible black candidates appeared and then materialized again for eligible white candidates and qualifications deemed essential for black candidates, became inoperative for white candidates. (*See,* pp. 9-11 *infra*).

As we show in Part II of this brief, this case is a garden variety example of purposeful racial discrimination against black candidates for teaching positions. The district court was required to consider the evidence of racial discrimination in its totality, but failed to do so. The court of appeals considered the totality of the evidence and concluded that the Government had established a prima facie case of a pattern or practice of purposeful discrimination. In this respect, the court of appeals was careful to make clear that while the statistical evidence provided "indications" or inferences of racial discrimination, the Government's prima facie case was bottomed on "actual" discrimination as well (Pet. App. 14b).[2] Because the record and the court of

[2] The opinions of the district court and the court of appeals are

appeals' opinion demonstrate that the Government proved a pattern or practice of purposeful discrimination, this Court should affirm the decision below without reaching the other issues in the case.

In Part III, we show that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as interpreted by *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), provides a second ground for affirming the decision of the court of appeals. This alternative ground is not dependent on proof of purposeful discrimination. Title VII bars "built-in headwinds" against the employment opportunities of minority groups unless they are justified by evidence of business necessity. A showing by the employer of good faith or benign intent, standing alone, will not suffice. The evidence in the record shows that the unwritten, vague and highly subjective criteria applied by Hazelwood's all-white staff of principals serve as built-in headwinds to minority applicants. The record also shows that Hazelwood introduced no evidence tending to show that its criteria and procedures are justified either by business necessity or even by sound business reasons.

In Part IV, we address petitioners' contention that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment authorizes Congress to extend Title VII to state and local public employees. To ascertain whether Title VII, as amended, may be sustained on the basis of the Commerce Clause, this Court must

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printed in the appendix to the petition for certiorari and are cited herein as "Pet. App." followed by the page reference. Petitioners' brief on the merits is cited as "Br." The Joint Appendix is cited as "JA." Our citations to testimony not printed in the Joint Appendix consist of the witness' name followed by the appropriate page of the deposition or trial transcript.

weigh the federal interests protected by Title VII against the impact of that statute on state sovereignty. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). As we show, the balance in this case should be struck in favor of the amendments to Title VII for the statute, as applied in this case, does not significantly infringe upon legitimate state interests, and the federal interests secured by the statute are substantial.

Likewise, the Court should reject petitioners' arguments concerning Section 5, which would narrowly restrict the ability of Congress to give effect to the great purposes of the Fourteenth Amendment. In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), this Court held that Congress may, under the enforcement clause of the Fourteenth Amendment, prohibit state conduct—the administration of literacy tests—that was not prohibited by the Amendment itself. The Court said that the relationship between the legislation in issue and the Fourteenth Amendment was sufficient because Congress could have concluded that the ban on literacy tests would help remedy discrimination in the provision of public services. In the case at bar, Congress actually determined to bar the use of unnecessary barriers to minority employment because, *inter alia*, such barriers perpetuate the effects of past discrimination against minority groups and because the elimination of those barriers to public employment would contribute to the nondiscriminatory provision of government services.

In sum, if this Court determines to review the constitutionality of Title VII insofar as it prohibits state conduct in the absence of proof of purposeful discrimination—even though such proof was adduced in this case—then the Court should sustain Title VII as an

appropriate exercise of the legislative powers conferred by the Commerce Clause and the Fourteenth Amendment.

II. THERE IS NO NEED FOR THIS COURT TO REACH THE CONSTITUTIONAL ISSUES PRESENTED BY PETITIONERS BECAUSE THEIR HIRING PRACTICES WERE SHOWN TO VIOLATE THE FOURTEENTH AMENDMENT'S PROHIBITION AGAINST PURPOSEFUL DISCRIMINATION.

Petitioners' brief is premised on the assumption that Hazelwood's employment practices were not shown to be purposefully discriminatory (Br. 26-27). Once that assumption is made, important issues of law may arise. But, there is ample evidence in this record demonstrating that Hazelwood has engaged in purposeful discrimination against black applicants for teaching positions. Although the district court did not reach that conclusion because it evaluated the evidence of purposeful discrimination piecemeal, the court of appeals corrected that mistake. It evaluated the evidence as a whole and concluded that Hazelwood had engaged in racial discrimination (Pet. App. 3b). Furthermore, as we read its opinion, the court of appeals concluded that this discrimination was purposeful. In any event, the record compels the conclusion that Hazelwood's hiring practices were purposefully discriminatory, and thus violated the Fourteenth Amendment as well as Title VII. Accordingly, this Court should affirm the decision below without reaching the constitutional issues presented by petitioners.

A. IN CONCLUDING THAT DEFENDANTS HAD NOT ENGAGED IN PURPOSEFUL DISCRIMINATION, THE DISTRICT COURT APPLIED AN IMPROPER STANDARD.

1. District Courts Must Consider the Totality of the Evidence in Determining Whether a School District's Employment Practices Are Purposefully Discriminatory.

It is well established that where a defendant's purpose, motive or intent is an element of an alleged violation of law, the courts must look to the totality of the defendant's conduct. For example, in anti-trust cases this Court has said that it is the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."[3] Similarly, where an employer's "good faith" or anti-union animus is in issue under the National Labor Relations Acts, as amended, 29 U.S.C. § 151 *et seq.*, it is the established rule that "the Board must inquire into the 'totality of the employer's conduct.' "[4]

The same rule applies where the Court must determine whether racial motive or purpose taints chal-

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[3] *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 705 (1948). *Accord*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 46-47, 75-77 (1911); *United States* v. *Reading Co.*, 253 U.S. 26, 43-44 (1920); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962).

[4] *N.L.R.B.* v. *Cascade Employers Assn., Inc.*, 296 F.2d 42, 47 (9th Cir. 1961). *Accord*, *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 139-40 (1st Cir. 1953); *N.L.R.B.* v. *Wonder State Mfg. Co.*, 344 F.2d 210, 216 (8th Cir. 1965); *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 741-42 (D.C. Cir. 1950); *N.L.R.B.* v. *National Seal Corp.*, 127 F.2d 776, 778 (2d Cir. 1942).

lenged practices or policies of a defendant. In *Washington* v. *Davis,* 426 U.S. 229, 242 (1976), this Court pointed out that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." And in *Keyes* v. *School District, No. 1, Denver,* 413 U.S. 189 (1973), this Court held that the trial court had failed to apply a proper legal standard when it compartmentalized the evidence relevant to the issue of segregatory intent. *Cf. Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 45 U.S.L.W. 4073, 4077-78 (Jan. 11, 1977).

2. The District Court Erroneously Compartmentalized the Evidence of Purposeful Discrimination.

As we show below, the district court did not consider all of the relevant factors together in resolving the issue of racial purpose. Instead, the court isolated each item of proof and weighed it as if it bore no relationship to the rest of the evidence.

The district court, in its analysis of the evidence,[5] narrowly and erroneously characterized the Government's contentions concerning racial purpose. According to the court, the Government contended that two facts "standing alone demonstrate[d] the operation of a dual system in Hazelwood"—(1) that prior to *Brown* v. *Board of Education,* 347 U.S. 483 (1954), Missouri law required all school districts to operate their schools on a racially segregated basis, and (2) that immediately after *Brown I,* the Hazelwood school board estab-

[5] The district court's analysis of the evidence commences on page 17 of its opinion (Pet. App. 17a).

lished a policy that would pay tuition for any black children who might reside in the district so that these children could be educated outside the district (Pet. App. 17a).

Having too narrowly defined the Government's contentions, the court held that "[p]laintiff's evidence falls far short of establishing that a dual system ever existed in Hazelwood" because there were no black students in Hazelwood prior to *Brown* and the policy adopted immediately upon the appearance of black residents after *Brown* "was not a policy of mandatory transfer and would in any case have had a de minimus effect," given the "small number of black students who might have been involved." (*Id.*).

In so characterizing the claims of the United States, the court failed to take account of the following facts adduced by the Government:

(1) Before *Brown* the school districts in St. Louis County assigned black faculty to black schools exclusively and Hazelwood, having no black schools, employed no black faculty (Pet. App. 3b);

(2) In determining to provide tuition for black children so that they would attend schools outside of the district, the Hazelwood School Board was consciously engaging in racial discrimination against black children (*id.* at 2a, 17a);

(3) As late as 1962, the school district advertised publicly for teachers who were "whites only" (*id.* at 3b);

(4) As late as the 1962-63 school year, some of Hazelwood's application forms still provided a space for designation of race (*id.* at 3b. *See also* Pet. App. 4a);

(5) The school district recruited for teachers extensively during the '60s and to a lesser extent during the '70s, but in all that time it never recruited at a teacher training institution having a predominantly black student body,[6] although there were such institutions well within the compass of the school district's recruiting area (*id.* at 3a-4a, 4b);

(6) Until at least 1967, the school district did not hire any black person in a nonteaching capacity such as janitor or bus driver (Kirby Dep. 3, 52-53, 55);[7] and

(7) For 15 years following *Brown,* the school board did not hire a single black teacher, notwithstanding the fact that by 1970, over 15 percent of all teachers, or approximately 3,000 teachers, in St. Louis City and County were black (*id.* at 3a, 18a, 4b, 10b).[8]

(8) During the two school years immediately prior to the trial, 1972-73 and 1973-74, seven black applicants were rejected because they had not yet received their teaching certificates while white

[6] In 1963 or 1964, Hazelwood's personnel director visited Lincoln University, a predominantly black school in Missouri. He met with the placement director but did not interview teaching candidates (Pet. App. 9b n.6).

[7] Superintendent Kirby testified that he served as superintendent of the Hazelwood district between 1953 and 1967 and that it did not hire a black person during that time in any "non certified" or nonprofessional capacity (Kirby Dep. 2-3, 52-53, 55).

[8] The district court adverted to the fact that no black faculty members were hired prior to 1969, saying simply—and erroneously—that plaintiff contends that this "shows a lack of affirmative action to overcome previous discrimination" (Pet. App. 17a). Plaintiff contended that the failure to hire a single black teacher in 15 years was evidence of purposeful discrimination (U.S. Trial Brief, p. 6, and U.S. Proposed Findings of Fact, ¶ 4).

candidates who also lacked certificates were employed to fill jobs sought by these black applicants.[9] In addition, Hazelwood advised four black applicants that there were no vacancies in their teaching areas, but soon thereafter hired white candidates to fill positions in those areas.[10] Finally, two black applicants who had served as student teachers in the system were not afforded the preference customarily granted for prior service in the Hazelwood District.[11]

[9] The court of appeals found that seven black applicants—Alice Moore Roach, Delores Penton, Georgia Shaw, Alexis Smith, Geraldine Thomas, Mary Etta Wilson and Robert Wilson—were rejected by Hazelwood for lack of certification at the time of their respective applications. In the period during or subsequent to 1972-73, Hazelwood hired as teachers at least thirty-nine whites who were not certified at the time of their application. (Pet. App. 18b-23b). *See also* Plaintiff's Trial Exhibit 61 (JA. 429-31) which identifies 101 persons serving as Hazelwood teachers who were not certified at the time of application. "Fifty-three of these teachers had not yet received their certification at the time they were offered employment" (Pet. App. 5b n.2).

[10] Hazelwood informed black applicants Derek Novel and James Washington that there were no vacancies in their field, social studies. Subsequently, it hired 20 social studies teachers. (Pet. App. 17b-18b). Black applicant Samuel Downs was informed that "there would probably be no vacancies in his field," industrial arts, and "never had a formal interview. . . . Two such vacancies were filled after his application . . ." (*id.* at 18b). Cynthia Edmond, a black applicant for a social studies position, "was told no vacancies existed" and was not interviewed; yet five whites were hired thereafter as social studies teachers. She renewed her application the next year, 1973, was again not interviewed, and nine more social studies teachers were hired (*id.* at 19b).

[11] "Persons with student or substitute teaching experience at Hazelwood are given preference if their performance was satisfactory. (Huss Dep. 29)" (Pet. App. 6a). Black applicant Robert Howell "had served as a student teacher at Hazelwood Senior High, and his cooperating teacher had been impressed with his abilities. Hazelwood offered no evidence to explain why Howell was

The district court's compartmentalized approach to the evidence is manifested in its treatment of the statistical evidence (Pet. App. 18a). Treating the Government's case as if it were based solely on statistics, the court stated that it "found no authority to suggest that a school district may be guilty of violating Title VII for failing to maintain a ratio of black teachers based upon the racial makeup of all teachers in the geographic area" (*id.* at 19a).[12] Thus, the court improperly isolated the statistical evidence instead of considering that evidence together with the rest of the case to determine whether the Government had established a prima facia case.

The court's piecemeal approach is further reflected in its treatment of the evidence demonstrating that the school district utilized vague, unwritten and highly

never interviewed for any of the 10 vacancies in social studies filled by whites subsequent to his application. Only one of these whites had more experience than Howell. Neither did Hazelwood attempt to explain why, as a former student teacher at Hazelwood, Howell was not given preference over other applicants, in light of their practice of doing so." (Pet. App. 17b-18b). Black applicant Georgia Shaw also had served as a student teacher in the Hazelwood District and had received a "laudatory recommendation" from her cooperating teacher, yet Hazelwood never interviewed her. (*Id.* at 21b-22b).

[12] The district court said that "the figure of 15% black teachers, against which plaintiff seeks to compare the Hazelwood district's employment record, is distorted by the inclusion of data from the St. Louis City district" (Pet. App. 19a). We do not understand why the available pool of black teachers is "distorted" by inclusion of those black teachers who teach in a nearby school system having a substantial percentage of black students and faculty. Even assuming some "distortion" existed, this could not begin to account fully for a complement of black teachers in the Hazelwood District which the trial judge found to be "undeniably meager" (*id.*).

subjective criteria. The court noted the need for published standards in order to prevent principals from abusing their "broad discretion" (*id.* at 22a). At the same time, the court concluded that none of the criteria that the principals said they used involved explicit "racial distinctions" (*id.*). It is not enough, we submit, to conclude that vague, subjective and unwritten criteria are not explicitly racial. It was necessary to consider whether, in light of other evidence of racially discriminatory hiring, the decision to vest unbridled and unsupervised discretion in white administrators was calculated to produce, and did produce, discriminatory hiring decisions.

Finally, the district court turned to the evidence presented by the United States regarding the school district's decision not to hire 55 black applicants during 1972 and 1973 (*id.* at 23a). Again, the court erected an artificial wall between related items of proof. In concluding that the United States had failed to prove intentional racial discrimination (*id.* at 23a-25a), the court did not review these hiring decisions in light of the relevant body of evidence showing a pattern of purposeful discrimination in hiring.

B. The Court of Appeals, Applying The Proper Standard, Correctly Concluded That The United States Had Established A Prima Facie Case Of Purposeful Discrimination.

Petitioners argue that "[t]he court of appeals did not find that Hazelwood had purposefully discriminated against black applicants for teaching positions" (Br. 16). Petitioners would have this Court read the opinion below as though it rested upon the notion that the Government had established a prima facie case of racial discrimination based solely on effect (*id.* at 16,

17). If that were so, of course, then the court of appeals would have relied only on the statistical data introduced by the United States. But the court of appeals did not rest its conclusion solely on statistical data. Rather, it cautioned against placing undue reliance on statistical evidence (Pet. App. 8b n.5).

Furthermore, petitioners' interpretation of the court of appeals' opinion would read out of that opinion one of its principal criticisms of the district court's decision—namely that it failed to give sufficient weight to the evidence showing that prior to *Brown,* Hazelwood operated pursuant to a State law requiring racial segregation; that until the early '60s Hazelwood requested applicants to identify their race; that as late as 1962 Hazelwood publicly advertised for teachers, specifying "whites only"; that throughout the '60s and into the '70s Hazelwood recruited extensively—but in predominantly white schools only; and that not a single black teacher was hired prior to 1969. The court of appeals found these facts "highly relevant" (Pet. App. 9b). They are relevant, of course, because they show a purpose to discriminate on the basis of race.

Finally, while the court was persuaded that the statistical evidence, when considered in light of Hazelwood's hiring procedures involving the use of vague criteria, "*indicated*" a prima facie case, the court was convinced that the Government had "*established*" a prima facie case only after determining that this aspect of the government's proof was buttressed by "evidence of *actual* discriminatory practices in the hiring of teachers during the period prior to the effective date of Title VII and in the rejection of some 16 black applicants . . ." (Pet. App. 14b-15b; emphasis added).

The evidence in the record warranted, indeed compelled, the conclusion of the court of appeals that the Hazelwood School District has engaged in a pattern and practice of purposeful hiring discrimination. Accordingly, this Court should affirm the judgment below without reaching the broad constitutional issues tendered by petitioners.[13]

III. PETITIONERS' USE OF UNWRITTEN, VAGUE AND HIGHLY SUBJECTIVE CRITERIA FOR HIRING TEACHERS VIOLATED TITLE VII BECAUSE IT SERVED AS A BUILT-IN HEADWIND THAT WAS NEITHER JUSTIFIED BY EVIDENCE OF BUSINESS NECESSITY NOR SHOWN TO BE JOB RELATED.

In this section, we show that there is a second ground for affirming the decision of the court below—namely that defendants' employment criteria and practices violated Title VII, as interpreted and applied by this Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). In *Griggs* this Court ruled that employment criteria or procedures which operate to exclude a significantly disproportionate percentage of minority group persons are barred by Title VII unless the employer shows that the criteria and procedures are justified by business necessity (*id.* at 431-32).

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[13] If this Court should disagree with our reading of the court of appeals' opinion, the Court should, on the basis of its own review of the evidence, affirm the judgment below on the ground that the Government proved a pattern or practice of purposeful discrimination. While this Court does not often sit to review evidentiary issues, such a review would be warranted by the Court's policy of avoiding far-reaching constitutional issues where the record presents a narrower ground for disposition of the case. *Neese* v. *Southern Railway Co.,* 350 U.S. 77, 78 (1955); *District of Columbia* v. *Little,* 339 U.S. 1, 3-4 (1950). *Cf. Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *United Public Workers* v. *Mitchell,* 330 U.S. 75, 90 n.22 (1947).

This Court made clear that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . ." *Griggs, supra,* 401 U.S. at 432.[14] We show below that Hazelwood's employment procedures and criteria serve as "built-in headwinds" against minority employment opportunity.

Long before *Griggs,* this Court recognized that seemingly neutral standards which vest broad discretion in white administrators may serve as barriers to minority participation in public activities. In *Smith* v. *Texas,* 311 U.S. 128 (1940), this Court noted that "the Texas statutory scheme [for selecting grand jurors] is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But, by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable" (*id.* at 130-31). In *Louisiana* v. *United States,* 380 U.S. 145 (1965), the Court said that "[t]he applicant facing a [voting] registrar in Louisiana . . . has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory. As the evidence showed, colored people,

[14] While petitioners place great weight on *Washington* v. *Davis,* 426 U.S. 229 (1976), nothing in *Davis* alters *Griggs'* ruling on intent. The Court in *Davis* stated that "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices" (*id.* at 246-47).

even some with the most advanced education and scholarship, were declared by voting registrars with less education to have an unsatisfactory understanding of the Constitution of Louisiana or of the United States," (*Id.* at 152-53).

Griggs and its progeny serve to prevent similar abuses by public and private employers. Where employers utilize unwritten, extremely vague and highly subjective standards that effectively confer unfettered discretion on hiring officials and that process disproportionately impedes the employment opportunities for minority groups, lower federal courts have held that the employer's hiring criteria and procedures violate Title VII unless they are shown to be justified by business necessity. *Muller* v. *United States Steel Corp.,* 509 F.2d 923, 928 (10th Cir.), *cert. denied,* 423 U.S. 825 (1975); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972); *Cf. EEOC* v. *Detroit Edison Co.,* 515 F.2d 301, 313 (6th Cir. 1975).

Hazelwood's vague and subjective criteria serve as built-in headwinds against minority groups. The court of appeals pointed out that in Hazelwood "each principal is vested with almost total discretion in hiring teachers for his school" (Pet. App. 12b). The only written instruction to these principals is to hire the "most competent." There is "no evidence . . . which would indicate that any two principals apply the same criteria—objective or subjective." Principals "are free to give whatever weight they desire to subjective factors . . . ." The interview process, at least in the minds of some principals, becomes so much a matter of personal taste or whimsy as to be " 'like dating a girl,

some of them impress you, some of them don't.' " [15] (*Id.*).

The potential for racial abuse inherent in Hazelwood's vague and highly subjective criteria is substantially enhanced by the fact that Hazelwood has hired white administrators exclusively (Plaintiff's Trial Exhibit 55, HEW 101 and 102 forms from School Year 1967-68 to 1972-73 and EEOC Form EEO5 for 1973-74). As a result, the intensely personal and subjective values that are factored into hiring decisions are loaded in favor of white candidates.[16] The administrators who approach the interviewing process for black and white candidates as though they were " 'dating a girl' " are white administrators only (Pet. App. 12b).

The record demonstrates that the potential for racial abuse has been realized. For fifteen years after *Brown,* the Hazelwood district did not hire a single black teacher. In recent years, black applicants have been barred on grounds not applied to white applicants,

[15] Even the district court observed that school officials in Hazelwood "should be encouraged to develop and publish standard guidelines for employment of teachers in order to minimize the possibility that an individual interviewer might abuse the broad discretion which he currently possesses" (Pet. App. 22a).

[16] In *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972), the Fifth Circuit noted that subjective evaluations, unstructured by written instructions "are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect nondiscriminatory action. See, *Hawkins* v. *North Carolina Dental Society,* 4 Cir., 1966, 355 F.2d 718, 723-24; *Cypress* v. *Newport News General and Nonsectarian Hosp. Assn.*, 4 Cir., 1967, 375 F.2d 648, 655; *Meredith* v. *Fair,* 5 Cir., 1962, 298 F.2d 696, 702, *cert. denied,* 1962, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed. 2nd 66."

vacancies have been found for white applicants though they purportedly did not exist for black applicants, and the customary preference for student teaching experience has not been afforded to at least two black candidates. (*See,* pp. 10-11, *supra*). Petitioners argue (Br. 46-49) that applicant flow data in the record show that black candidates in more recent years have been hired at a rate as high as or higher than the hiring rate for white candidates. Petitioners' argument rests on a factually unsupported premise. While one may be able to determine how many black teachers are in fact hired each year by Hazelwood, one cannot reliably determine how many of the persons applying to Hazelwood for employment are black because, as the district court found, Hazelwood has not required applicants to submit photographs or to otherwise identify their race since 1962-63 (Pet.App. 4a, 3b). Whatever the gross statistics may be, they cannot refute or explain the fact that individual black applicants have been treated differently from similarly situated white applicants.

The defendants have offered no evidence that the built-in headwinds created by their hiring procedures and criteria are justified by business necessity. Indeed, they have offered no evidence that these procedures and criteria are job-related. In view of the Government's evidence, it is clear why they did not attempt to offer such proof. Here, as in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 433 (1975), "[t]here is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria—or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way to determine whether the cri-

teria *actually* considered were sufficiently related to the ... [employer's] legitimate interest in job-specific ability to justify a ... system with a racially discriminatory impact." Accordingly, petitioners' hiring criteria and procedures are repugnant to Title VII.

IV. EXTENSION OF TITLE VII COVERAGE TO PUBLIC EMPLOYERS IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER BOTH THE COMMERCE CLAUSE AND SECTION 5 OF THE FOURTEENTH AMENDMENT.

In the Equal Employment Opportunity Act of 1972, Congress extended Title VII to agencies of state government, relying upon the authority granted to it by the Commerce Clause, Article I, § 8, cl. 3, and Section 5 of the Fourteenth Amendment. See H.R. Report No. 92-238, 92d Congress, 1st Session 19 (1971); S. Rep. No. 92-415, 92d Congress, 1st Session 11 (1971), 118 Cong. Rec. 1816, 1839-40 (1972) (remarks of Senators Williams and Javits). Petitioners contend that in light of this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), and *Washington* v. *Davis, supra,* neither source of legislative authority can sustain Title VII of the Civil Rights Act of 1964 insofar as that law bars state and local public agencies from engaging in employment practices which, while adversely affecting minority groups and females, are not shown to be purposefully discriminatory (Br. 18-19). We show below that petitioners have overdrawn the scope of *National League of Cities* and the impact of *Washington* v. *Davis.* Both the Commerce Clause and the Fourteenth Amendment support Title VII as amended in 1972.

A. The Commerce Clause Authorizes Application Of Title VII To Agencies Of State Government.

1. In *National League of Cities,* this Court held that the minimum wage and maximum hour provisions of the Fair Labor Standards Act could not constitutionally be applied to employees of state and local governments who were engaged in traditional government functions. The teaching of *National League of Cities* is that even though an activity directly affects interstate commerce, pertinent legislation based on the Commerce Clause *may* nonetheless be invalid if it offends state sovereignty principles inherent in the federal constitution and embodied in the Tenth Amendment (*id.* at 840-41; see also Brennan, J., dissenting at 858). The holding of that case is that these principles constitute an affirmative limitation on Congressional exercise of the commerce power when that power is exercised in a fashion that unnecessarily intrudes upon governmental " 'functions essential to [the] separate and independent existence' " of the state (*id.* at 845, quoting from *Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911)).

National League of Cities does not indiscriminately bar all federal legislation enacted pursuant to the Commerce Clause that would regulate state agencies in their role as employers. The Court specifically declined to overrule *Fry* v. *United States,* 421 U.S. 542 (1975) (sustaining congressional power to apply a wage freeze to employees of state government); *Parden* v. *Terminal Railway Co.,* 377 U.S. 184 (1964) (sustaining congressional power to apply the Federal Employers Liability Act to state-owned railroads); *California* v. *Taylor,* 353 U.S. 553 (1957) (sustaining congressional power to apply the Railway Labor Act

to state-owned railroads); or *United States* v. *California,* 297 U.S. 175 (1936) (sustaining congressional power to apply the Safety Appliance Act to state-owned railroads). Rather, *National League of Cities,* as we read it, sets forth a three-fold test for determining whether federal regulation of state affairs under the Commerce Clause violates Tenth Amendment proscriptions. First, the legislation must affect "areas of traditional governmental functions" of the states and not merely proprietary functions (426 U.S. at 852). Second, the legislation affecting such traditional governmental functions must impair an attribute of state sovereignty which is "essential" to the states' "separate and independent existence" in the federal system; *e.g.,* the right to determine the wages of state employees (*id.* at 845). Third, the federal interest in the legislation must not outweigh the impact of the legislation on the states (*id.* at 851-52).

That this Court applied a balancing test in *National League of Cities* seems clear from the rationale which the Court used in reconciling its holding with that in *Fry* v. *United States,* 421 U.S. 542 (1975) (*id.* at 852-53). The opinion of the Court acknowledged that the legislation sanctioned in *Fry* intruded upon the states' sovereign authority. Nonetheless, the Court concluded that *Fry* and *National League of Cities* were reconcilable since the federal interest in imposing narrowly drawn, "emergency" legislation exceeded the degree of intrusion resulting from temporary inhibitions upon state and local prerogatives.[17] As we show below,

[17] See Mr. Justice Blackmun's concurring opinion, 426 U.S. at 856 ("I may misinterpret the Court's opinion but it seems to me that it adopts a balancing approach . . ."). *See also* Mr. Justice Brennan's dissenting opinion (*id.*). Lower courts have concluded that *National League of Cities* requires a balancing test. *E.g., Christensen* v. *State of Iowa,* 417 F.Supp. 423 (N.D. Iowa 1976); *Usery* v. *Univ. of Texas at El Paso,* 12 EPD ¶ 11,254 (W.D. Tex. 1976); *Usery* v. *Kenosha Unified School Dist. Number One,* 13 EPD ¶ 11,240 (E.D. Wis. 1976). *See also Usery* v. *Fort Madison Community School District,* 79 LC ¶ 33,419 (S.D. Iowa, 1976); *Usery* v *.Bettendorf Community School District,* 423 F.Supp. 637 (S.D. Iowa 1976); *Usery* v. *Dallas Independent School District,* 421 F.Supp. 111, 114-16 (N.D. Tex., 1976); *Usery* v. *Kermit C. Morrissey,* 79 LC ¶ 33,455 (D. Mass. 1976).

the balance struck in *National League of Cities* does not dictate the same result here.

2. Petitioners have not demonstrated that Title VII intrudes upon an attribute of state sovereignty which is essential to the state's independent existence, nor that the federal interest is outweighed by Title VII's impact on state sovereignty. As petitioners acknowledge, Title VII does not directly impose costs upon covered state or local agencies (Br. 21). The point is an important one, for the direct imposition of substantial costs upon state and local agencies appears to have been the principal, if not determinative, factor that led this Court in *National League of Cities* to invalidate in part the Fair Labor Standards Act (426 U.S. at 845-47).

In arguing that Title VII infringes upon state sovereignty, petitioners have erroneously stated the burdens that Title VII imposes. Petitioners claim to be burdened by the record-keeping and reporting requirements decreed by the court of appeals and by its directive that petitioners afford the right of first refusal to 16 black applicants determined by that court to have been denied their Title VII rights (Br. 21). These requirements, however, were imposed only be-

cause petitioners had violated Title VII. That law does not lay these "burdens" upon employers who comply with its provisions.

Petitioners further argue that as a practical matter school districts may satisfy the requirements of Title VII only if they engage in racially, religiously or sex-oriented hiring practices designed to bring their average workforce statistics up to the defined area standard, without regard for qualifications (Br. 22). This is so, petitioners assert, because "[i]n view of the inherently subjective nature of the process of hiring teachers," a prima facie case of statistical discrimination "cannot be rebutted" (*id.*).

Petitioners' argument assumes that under Title VII a prima facie statistical case of discrimination in the hiring of teachers can only be rebutted by a showing that the employer utilized objective criteria. But Title VII was not so applied by the court below. That court did not conclude that Title VII required petitioners to utilize objective criteria. On the contrary, it ordered petitioners to formulate a written "description of the proper *subjective* factors to be considered" during interviews (Pet. App. 26; emphasis added). Thus, this case does not present the questions whether a prima facie statistical case of discrimination in the hiring of teachers can be rebutted under Title VII only by a showing that the employer used objective criteria, and, if so, whether Title VII, as so construed, is constitutional.

Petitioners also stress language from *Milliken* v. *Bradley,* 418 U.S. 717, 741-42 (1974), regarding the tradition of "local control" that has prevailed in public education. Relying on prior cases, the Court in *Milliken* pointed out that such "local control . . . affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence' " (*id.*). We fail to see how these values are undermined by the application of Title VII to Hazelwood. In our view, local citizens would have a more adequate "opportunity to participate in decisionmaking" and the structuring of programs concerning teacher hiring if the school system maintained a written body of hiring criteria rather than a conglomeration of procedures so unstructured as to afford no focus for citizen comment or criticism (*see* pp. 17-18, *supra*).

3. The alleged burdens complained of by Hazelwood which are attributable to Title VII are, in our view, clearly outweighed by the federal interests involved. The legislative history of the Civil Rights Act of 1964 shows that in adopting Title VII, Congress recognized that this nation needed to draw extensively upon the talents and energies of minority group persons and females. *E.g.,* H.R. Report No. 1370, 87th Cong., 2d Sess. 3 (1962), *reprinted in* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 2157. The 1972 Amendments to Title VII not only substantially helped to meet this need, but also implemented the Constitution's commitment to the protection of the civil rights of all persons. As we discuss later in greater detail, the 1972 Amendments to Title VII serve this commitment by barring state and local government employment practices that unnecessarily freeze in the effects of prior discrimination and by furthering elimination of discrimination in public

services. See *infra,* pp. 30-35. These federal interests, we submit, outweigh any legitimate interest that state and local governments may have in being free to utilize unnecessary hiring criteria and procedures which seriously disadvantage minority groups.

In a related context, lower federal courts which have reached the question subsequent to *National League of Cities* have concluded that the Equal Pay Act, as applied to state and local government employees, is within the power of Congress under the Commerce Clause. These courts have determined that the federal interest served in preventing employers, whether or not motivated by a discriminatory purpose, from engaging in pay practices which treat similarly situated men and women differently outweighs any state interest in preserving the power to indulge such disparate treatment.[18] In like fashion, this Court should hold that the federal interests in promoting equal opportunity in public employment outweigh the purported sovereign right of state and local agencies to exclude protected minorities on the basis of criteria and procedures that are not shown to be justified by business needs.

B. SECTION 5 OF THE FOURTEENTH AMENDMENT AUTHORIZES APPLICATION OF TITLE VII TO STATE AND LOCAL PUBLIC EMPLOYERS.

1. Principles of State Sovereignty Do Not Restrict the Scope of Legislation Enacted Pursuant to § 5 of the Fourteenth Amendment.

While the grant of legislative authority in the Commerce Clause must accommodate state sovereignty

[18] See cases cited at note 17, *supra.*

principles preserved by the Tenth Amendment, those principles do not have a similar restrictive effect on legislation enacted pursuant to Section 5 of the Fourteenth Amendment. In *Ex Parte Virginia,* 100 U.S. 339 (1879), this Court observed that the Civil Rights Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress," 100 U.S. at 345. The Court concluded that Congress' authority to enact appropriate legislation is plenary:

> "[T]he Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." 100 U.S. at 347-48.

Last term in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976), the Court noted that Section 5 of the Fourteenth Amendment was designed specifically to permit legislation that would inhibit a state's sovereign power.

> ". . . [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, [citations omitted] are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections

by their own terms embody limitations on state authority."

See also South Carolina v. *Katzenbach,* 383 U.S. 301, 324 (1966) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting").

In sum, legislation enacted pursuant to Section 5 of the Fourteenth Amendment is not limited by the precepts of the Tenth or Eleventh Amendments. Therefore, if Title VII is "appropriate" legislation within the meaning of Section 5—an issue to which we now turn—then it must stand.

2. Section 5 of the Fourteenth Amendment Empowers Congress to Prohibit Conduct That May Lie Outside the Direct Prohibitions of the Equal Protection Clause If the Legislation Is in Aid of the Equal Protection Clause.

Petitioners urge that legislation cannot be "appropriate" within the meaning of Section 5 if it prohibits state conduct "in the absence of proof of purposeful discrimination" (Br. 31). Petitioners' argument, however, collides with this Court's ruling in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966).

In *Morgan,* the Court upheld Section 4(e) of the Voting Rights Act of 1965, which prohibited states from denying voting privileges to non-English speaking citizens who were educated in "American flag" schools. The defendants in *Morgan* urged that because the Court had previously determined that literacy requirements do not *per se* violate the Fourteenth Amendment, Congress could not enact Section 4(e).

See Lassiter v. *Northampton County Board of Education,* 360 U.S. 45 (1959). This Court, however, rejected this argument. It ruled that Section 5 permits Congress to exceed the Fourteenth Amendment's substantive standards where Congress believes that the prohibition of otherwise permissible practices will aid in the elimination of Fourteenth Amendment violations. As the Court stated in *Morgan,* "[c]orrectly viewed, § 5 [of the Fourteenth Amendment] is a *positive grant* of legislative power authorizing Congress to exercise *its discretion* in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" (*id.* at 651; emphasis added).

In applying this standard, the *Morgan* Court noted that Congress might well have concluded that elimination of English literacy tests would enhance Puerto Rican political power and thereby prevent governmental discrimination against the entire Puerto Rican community in matters relating to the provision of public services. 384 U.S. at 652-53. Since the Court could "perceive a basis" upon which Congress could find a rational relationship between the prohibited practice and a recognized Fourteenth Amendment violation, it upheld the legislation as an appropriate exercise of Congress' enforcement clause authority. See also *Ex Parte Virginia,* 100 U.S. 339, 345-46 (1879): "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought

within the domain of congressional power." See also *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966) (expressing in the same broad terms the scope of Section 2 of the Fifteenth Amendment); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968) (same as to Section 2 of the Thirteenth Amendment); *Everard's Breweries* v. *Day,* 265 U.S. 545, 558-559 (1924) (same as to Section 2 of the Eighteenth Amendment).[19]

Thus, the decisions of this Court are inconsistent with petitioners' argument that legislation cannot be appropriate within the meaning of Section 5 if it prohibits state conduct "in the absence of proof of purposeful discrimination" (Br. 31).[20]

3. Extension of Title VII to State and Local Public Employers Is Within the Authority of Congress Under Section 5 of the Fourteenth Amendment.

(a) The legislative history of the 1972 Amendments to Title VII demonstrates that Congress sought not only to eliminate the isolated discriminatory acts of

[19] And *see United States* v. *Guest,* 383 U.S. 745 (1966), where six justices in concurring opinions declared that Section 5 authorizes Congress to punish private conspiracies that impede Fourteenth Amendment rights.

[20] Petitioners seek comfort from *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), but their reliance is misplaced. In that case, this Court, by a 5-4 vote, concluded that Congress lacked authority under Section 5 of the Fourteenth Amendment to require states to permit 18 year olds to vote in state elections. A majority of this Court was assembled in support of this position only because three justices, in an opinion authored by Mr. Justice Stewart, could not conceive of any constitutional infirmity that the statute might possibly have been designed to address. Because they could find no possible constitutional violation that would be remedied by legislation, these three justices did not decide what remedial legislation is appropriate once it is established that the objective of Congress is to remedy acknowledged Fourteenth Amendment violations.

public officials but also to remove unnecessary barriers to minority group employment—barriers which had the effect of perpetuating the past purposeful discrimination that had occurred throughout American society and was especially pervasive in state and local governments. The preceding seven years of litigation under Title VII, culminating in this Court's decision in *Griggs,* had demonstrated that unnecessary job requirements, though facially neutral, served to freeze in the effects of past racial discrimination against minority groups. The Senate Committee Report summarized the lessons of those seven years as follows:

> "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> "Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, *perpetuation of the present effect of pre-act discriminatory practices through various institutional devices,* and testing and validation requirements." (S. Rep. No. 92-415, 92d Cong., 1st Sess., 5, 10 (1971); emphasis added)

The Senate Committee Report also states that findings of the U.S. Commission on Civil Rights

> "indicate that the existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through *de facto* segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector." (*Id.*)

Congress, aware of the pervasive and massive purposeful discrimination which had occurred in the past —including the maintenance of dual school systems in many states such as Missouri—wanted to insure that the effects of such discrimination were not perpetuated by needless barriers which continued the exclusions and disadvantages suffered by minorities as a result of past intentional discrimination.[21] The Equal Protection Clause, by its own force, bars a state from perpetuating the effects of its own prior discrimination. *See Louisiana* v. *United States,* 380 U.S. 145, 154-55 (1965); *Gaston County* v. *United States,* 395 U.S. 285, 296-97 (1969). But in seeking to remove the effects of prior purposeful discrimination by public agencies, Congress may prevent one agency from perpetuating the effects of discrimination wrought by another agency, and Congress need not limit the protection of its statute to those members of the victimized class who

[21] The countless references to *Griggs* in the testimony, reports and debates preceding the adoption of the 1972 amendments leave no doubt that Congress was aware of and intended to curtail the use of procedures by state and local public employers that needlessly freeze in the effects of past discrimination.

are able to disentangle the effects of private and official discrimination and to trace their plight to the latter. Pursuant to the "positive grant" of authority in Section 5 of the Fourteenth Amendment, Congress may in its "discretion" determine that such past intentional discrimination has been sufficiently pervasive to warrant a blanket prohibition against unnecessary procedures and criteria which would have the effect of perpetuating prior discriminatory practices. It could conclude that case-by-case litigation in which individual minority group members had the burden of establishing that they were individually victimized by such prior discrimination would be unduly burdensome and ineffective in removing the barriers which Congress wished to dismantle.

Congress, on the basis of the facts and testimony before it, had a rational basis for finding that its chosen regulatory scheme was necessary to remove the evil it was addressing. Its action was within the scope of its power under Section 5, which confers upon Congress "the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Katzenbach* v. *Morgan,* 384 U.S. 641, 650 (1965). For Congress is empowered, in pursuit of a "legitimate end" which is "within the scope of the Constitution," to adopt "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution . . . ." *Id.* at 650, 651. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 327-328 (1966). *Katzenbach* v. *McClung,* 379 U.S. 294, 303-304 (1964); *United States* v. *Darby,* 312 U.S. 100, 120-121 (1941); *Everard's Breweries* v. *Day,* 265 U.S. 533, 560-561 (1924).

(b) There is an additional basis supporting Congress' reliance upon the authority granted in Section 5 of the Fourteenth Amendment. The legislative history shows that Congress, in extending Title VII to state and local public agencies, intended to further the elimination of purposeful discrimination in the provision of public services. In 1972, when Congress amended Title VII to cover state and local public employers, discrimination in public services, like discrimination in public employment, was still pervasive. Congress was concerned with insuring that minority group persons were employed in the various levels of state and local government because that would impede discrimination in the provision of public services. Senator Williams, the floor manager for the 1972 Amendments, urged in debate that:

> "this failure of state and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance that these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident." 118 Cong. Rec. 784-823 (daily ed. Jan. 31, 1972) (remarks of Sen. Williams), *reprinted in* Senate Subcommittee on Labor, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972,* at 1114 (1972).

In the same speech, Senator Williams stated that ". . . employment discrimination at the state and local government level reflects very unfavorably upon the ability of those governmental units to deal equitably in their contracts [*sic*] with those groups against whom

they discriminate in employment" (*id.* at 1116). Senator Williams based his view, at least in part, upon a report of the United States Commission on Civil Rights that was incorporated into the legislative record. That report reflected that in Albuquerque, New Mexico, where no Mexican-American law enforcement officer held a high-ranking position, the Spanish-speaking community continuously complained of police misconduct. In contrast, the report noted that in another large city in New Mexico where the Spanish-speaking community was represented at all levels within the police department, police-community relations were excellent because the Spanish-speaking community was confident that it would receive fair treatment from the police. "Mexican Americans and the Administration of Justice in the Southwest: A Report of the United States Commission on Civil Rights," reprinted in Legislative History of the Equal Opportunity Act of 1972, *supra* at 1130 (1972).

As petitioners point out, this Court sustained the statute at bar in *Morgan* because the Court perceived that Congress "could have concluded" that literacy tests should be banned "in order to remedy discrimination against Puerto Ricans in the provision of public services" (Br. 34). As the foregoing legislative history reveals, a similar rationale was actually considered by Congress when it determined to bring state and local officials within the coverage of Title VII.

Thus, in the 1972 Amendments, Congress sought to prevent official perpetuation of the effects of prior racial discrimination, as well as to encourage the provision of public services to all persons without discrimination on the basis of race, sex or national origin.

Designed as they are to secure the guarantees of the Fourteenth Amendment, the 1972 Amendments to Title VII are authorized by Section 5 of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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